Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

Bruce W. and Wanda G. Smith, Individually and as Representatives of the Estate of Justin Wayne Smith, Deceased

*Petitioners*

v.

Byron Keith Blue, and Harris County

*Respondents*

On Petition For Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

# PETITION FOR WRIT OF CERTIORARI

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38 pp

## I. Questions Presented for Review

**Question Presented for Review #1:**

Whether the Court of Appeals for the Fifth Circuit erred in affirming the summary judgment in favor of Byron Blue, on his defense of qualified immunity, when many of the complained of acts and omission were mandatory, ministerial procedures not excused by that defense.

**Question Presented for Review #2:**

Whether Byron Blue's acts were objectively unreasonable and, therefore, subjectively deliberately indifferent to Justin's known legal rights, thereby eliminating Blue's defense of qualified immunity.

**Question Presented for Review #3:**

Whether the Court of Appeals for the Fifth Circuit erred in affirming the District Court's grant of summary judgment based upon Byron Blue's testimony because his felony conviction for falsifying the observation sign-in sheets in connection with Justin Smith's death under the Texas Penal Code §37.09 makes his testimony unreliable, thus creating a genuine issue of material fact which is properly determined by a jury.

**Question Presented for Review #4:**

Whether Harris County's policy of warehousing children with known diagnosed mental illness in penal institutions which lacked the capacity to provide adequate medical treatment violated Justin Smith's rights under the 8th and 14th Amendment of the United States Constitution and Texas Statute.

**Question Presented for Review #5:**

Did Harris County create a hierarchy designed to insulate its policy makers from gaining actual knowledge of obvious constitutional violations.

## II. Parties to the Proceeding

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Fifth Circuit.

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## V. Citations of the Official and Unofficial Reports

The *per curiam*, unpublished, opinion of the United States Court of Appeals for the Fifth Circuit, whose judgment is herein sought to be reviewed in case No. 01-20205, was delivered and filed on April 12, 2002. *See* Appendix A. The prior unpublished opinion of the United States District Court for the Southern District of Texas, Houston Division, in Civil Action No. H-99-1787, was delivered and entered on December 21, 2000. *See* Appendix B.

## VI. Basis for Jurisdiction

The unpublished, *per curiam* opinion of the Court of Appeals was entered on April 12, 2002. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254.

## VII. Constitutional Provisions and Statutes Involved

Constitution of the Unites States of America, Amendment VIII; Constitution of the United States of America, Amendment XIV; Civil Action for Deprivation of Rights, 42 U.S.C.A. §1983. *(See* text in applicable appendices).

## VIII. Statement of the Case

On May 12, 1997, Justin Wayne Smith was taken to Juvenile Detention Westside Command Center, a/k/a the Delta 3 Boot Camp ("Boot Camp") for violating his probation by staying out past his assigned curfew. District Judge Mary Craft, ordered him assigned to the Boot Camp. She found Justin's temporary removal from the custody of his family and placement within the care and custody of Harris County Juvenile Probation Department (HCJPD) to be in his best interest. R. 1604.

Before and shortly after arriving at Boot Camp, numerous evaluations by several private and county, doctors, counselors and psychologists determined that Justin suffered from severe depression, learning disabilities, ADHD and bi-polar disorder. R. 744. At that time, Justin was designated as a "priority" or "target population" case, which should have required that he be placed in a facility with the ongoing ability to properly treat his conditions. R. 732. He was never so assigned or transferred.

Justin was taking Prozac for treatment of his depression for over a year prior to his arrival at Delta 3. Although there were

periods when Justin's prescription ran out, HCJPD doctors generally continued him on the same medication. *Id.* Harris County was aware that, prior to his detention, Justin had "suicidal ideation" and "suicide problems". HCJPD knew that only two months prior to his detention, Justin had actually attempted suicide.

Justin, while a detainee at the Boot Camp, committed suicide on September 2, 1997, by hanging himself with a bed sheet tied to a sprinkler head. **R. 1676-1677, 1679-1680.** At the time of his death, Justin Smith had been left unattended and unsupervised in his confinement cell, as punishment for refusing to come out from underneath his bed. R. 1246.

On the night of his death, the Boot Camp was understaffed and in violation of Texas Juvenile Probation Commission standards for the trainee to staff ratio.[1] R. 1679-1680. According to the post-death investigation conducted by Terry Snow, on September 2, 1997, the Boot Camp was routinely operating under-staffed. Morale of the staff was extremely low. To save time, staff members and

[1] A chronic condition for which the unit was routinely cited, giving direct notice to County Judge Eckels, Chairman of Harris County Juvenile Probation.

supervisors engaged in the routine practice of pre-signing the visual inspection check forms which are posted outside of the trainees' rooms while the trainees are on temporary confinement. *Id.*

During the four months of his incarceration, Justin Smith repeatedly tried to physically harm himself. R. 1247. In the week immediately prior to is death, he repeatedly threatened suicide in front of other detainees, drill instructors, and even his own caseworker. Employees of Boot Camp and Defendant Harris County, were aware of Justin Smith's severe depression, psychological disorders, threats of suicide and even of Justin's previous suicide attempts. Defendants took no action to properly treat and safe guard Justin Smith as his condition deteriorated. R. 744, 1612, 1667. This failure ultimately resulted in Justin Smith's death.

***Six days*** before his death, Justin was caught attempting to commit suicide in the exact same manner in which he eventually died: standing on a table in his cell, trying to attach one end of a sheet around his neck (and the other around a sprinkler head) in an obvious attempt to hang himself. R. 1247. Rather than send Justin for psychiatric care and treatment, Blue put him in "restraints" (a

straight jacket) and a helmet, and left him in isolation, apparently as punishment. A report of this incident was written by the supervisor and sent to Bill Thompson, the Deputy Director of Harris County Institutions; however, it appears the report sat on Thompson's desk, unread, until after Justin killed himself.

Defendant Harris County admits that Boot Camp Employees witnessed Justin Smith harm himself on other occasions. Justin repeatedly banged his head against a wall to the point he was placed in head gear and a straight jacket. He carved words and markings into his body, leaving permanent scars. Superintendent Larry Smith wrote a report stating "trainee Smith was seen standing on a table with a sheet around his neck." Smith "was about to harm himself." R. 1247. Blue again ordered Justin placed in mechanical restraints and head gear. R. 1667. Harris County admits that it did not get Justin medical treatment as follow-up for the August 27, 1997 incident.

This was in direct violation of reasonable medical practice. The Boot Camp should have placed Justin on "suicide watch" and closely monitored him at all times. This was even more necessary in

light of Justin's constant threats of suicide in the week preceding his death. Blue and Harris County continued to be deliberately indifferent to Justin's mounting psychological crisis. Instead of providing proper care, Blue treated Justin as a "discipline" problem. In addition, Harris County chose to deliberately disregard the County's Psychological Screening which classified Justin as both a "priority" and "target population" case and mandated that he be housed in a facility which had the ongoing ability to properly treat him R. 732. Cheryl Hicks was assigned as Justin Smith's caseworker during his confinement at Delta 3. R. 1520. Hicks was aware of Justin's diagnosis of severe depression, prescription for Prozac, and prior suicidal ideation. R. 1570. While Hicks is licensed as a professional counselor, she states that she did not actually counsel Justin and was, in fact, not allowed to do so. R. 1569. The records maintained by Harris County Mental Health and Mental Retardation (MHMR) indicate that Hicks provided individual counseling to Justin a total of (31) thirty one times: she denied it. Terry Snow, who conducted the investigation into Justin's tragic death noted that "the sections normally filled out by the medical department and

caseworker were blank." R. 1679. Harris County refused to allow trained counselors, already on staff, to provide basic counseling to help Justin through this critical time.

On September 1, 1997, Justin Smith was placed in solitary confinement after refusing to come out from underneath his bed and participate in the unit's daily programs. Defendants, although aware of Justin's mental problems and his threats of suicide, kept Justin in solitary confinement, unsupervised and without securing his cell by removing potentially dangerous objects he could use to harm himself. Justin killed himself by making a noose, using his bed sheet, and hanging himself from an improperly anchored sprinkler head. R. 1679-1680.

When a child is placed in temporary confinement, as Justin had been, the HCJPD written policy is to visually check on the child every fifteen (15) minutes. R.829. However, because of staffing cuts, this policy was informally amended allowing for the pre-signing of forms at the beginning of each shift. This is what occurred on the night Justin Smith died. On September 2, 1997, the date of Justin's suicide, written Boot Camp policy would have resulted in visual

checks on Justin every fifteen (15) minutes, with shift supervisors (Defendant Blue) making checks every hour. R. 829. Instead, Defendant Wynn was allowed to initial the inspection form at the start of his shift (showing he checked on Justin Smith every fifteen (15) minutes), when in truth, he was not in the unit for much of that time R. 1676-1677.

Harris County's records, as approved by its supervisor (Blue) on September 2, 1997, reflected that Justin Smith had been routinely observed and monitored every fifteen (15) minutes, through 11:15 p.m. R. 1671. These records were clearly false: Justin Smith was discovered dead at approximately 7:45 p.m. R. 1665. Upon discovering Justin Smith's body, Defendant and Supervisor Blue ordered that the original inspection records be removed and replaced with a report showing visual checks only up until shortly before Justin Smith's death. R. 464.

Defendant Blue, Officer Wynn and many other employees admitted to investigating police officers and to Ms. Snow that it was routine practice as well as the unwritten policy of the Boot Camp to fill out the inspection report at the beginning of their shift, to "speed

up" paperwork and make due with the short staffing. R. 1244, 1679-1680. This was common knowledge and practice with all who worked at the Boot Camp. After Justin's tragic death, Defendant Harris County employee, Terry Snow, concluded in her investigation that:

> a common theme appeared to be the concern from all staff [Boot Camp] interviewed about the 'low morale' caused by Administration. They specifically pointed to Larry Smith [superintendent of Boot Camp]. Staff stated that 'most of the supervisors and D.I.s presigned forms,' and this was common knowledge. Staff cited the 'indifference and lack of involvement' by Larry Smith....it is apparent that this is their perception. The only incident that lends support to this theory is the obvious lack of involvement or follow up of a serious incident of self abusive behavior." *Id.*

Furthermore, the first EMS who arrived at the scene, estimated that Justin Smith had been dead for approximately an hour; confirming that checks had not been properly made (as alleged by Blue) despite the advanced sign ins.

Absent staffing cuts and the change in policy, Justin would have been checked on every fifteen minutes and would, in all likelihood, be alive today. R. 1676, 1679-80. Harris County's policy was to warehouse children, clinically diagnosed as depressed, bi-

polar, etc. in a purely penal facility, denied children including Justin the ability to be overseen by properly trained staff and provided ongoing psychological counseling, timely intervention and other necessary medical care.

Harris County and Byron Blue's actions denied Justin Smith adequate medical treatment to which he was entitled to receive under the 8th Amendment to the Constitution of the United States. In doing so, each also denied Justin his right to have Harris County and its employees protect his (and every child's) best interest.

Plaintiffs Bruce Smith and Wanda G. Smith, Individually and as Representatives of the Estate of their deceased son, Justin Smith, sued Harris County, Byron Keith Blue and Robert Allen Wynn for conditions and actions they believed caused their child's death. On January 17, 2001, the Honorable Nancy Atlas of the United States District Court in and for the Southern District of Texas, Houston Division granted summary judgment on behalf of Blue and Harris County. Judge Atlas also denied Plaintiffs' Request for Entry of Default Judgment as to Defendant Robert Wynn and dismissed all claims against him.

Plaintiffs appealed to the United States Court of Appeals for the Fifth Circuit regarding those portions of the District Court's Order which granted Defendant Byron Blue and Defendant Harris County's Motions for Summary Judgment. The United States Court of Appeals for the Fifth Circuit affirmed the District Court's Orders; however, its opinion left two of Appellants' questions completely unaddressed.

This Writ of Certiorari presents all issues which were presented to the United States Court of Appeals for the Fifth Circuit as well as presents new issues raised by the Fifth Circuit's opinion.

## IX. Argument

### Question Presented for Review #1

> Was Byron Blue entitled to invoke the defense of qualified immunity and, therefore, obtain summary judgment on conduct concerning ministerial acts.

The affirmative defense of qualified immunity is only available to governmental officials performing discretionary tasks. *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994). The duty to make timely required check-ins (or, as the shift supervisor, to ensure that the same are timely made), to contemporaneously complete the

posted log-in sheet as the timely cell checks were completed, and, to "suicide proof" the cells of those children placed or left in isolation during his shift all appear to be routine ministerial tasks, or those that relate to an act that involves obedience to instructions or laws instead of discretion, judgment or skill. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982).

The written policies and procedures at Delta 3 Boot Camp required that guards and supervisors , including Byron Blue, monitor and visually inspect detainees in isolation, like Justin Smith, at certain set intervals. This was not done. R. 829, 1680. Those same policies required the check be properly logged in and verified. That ministerial act was also not performed. Finally, Justin's cell was not suicide proofed for the second time in less than a week. All of these duties were ministerial and were the direct responsibility of Byron Blue, the supervisor of the 3-11 shift on September 2, 1999, the day Justin Smith died. R. 829, 1242, 1680.

If it is shown, as Blue suggest, that Harris County varied that policy, a claim Harris County denies, at minimum a fact issue exists, also precluding summary judgment. There is no evidence that

officers, such as Blue, had any written grant of authority making their performance of these duties discretionary. R. 829, 1242. The language of the policy manual is clear and unequivocal regarding the periodic checks and log-ins. It states "Juveniles **shall** be checked and documented a minimum of every fifteen (15) minutes. BACK AND FRONT OF FORM **MUST** BE COMPLETED." R. 829. (emphasis added). Byron Blue's failure to properly perform these ministerial acts violated Justin's rights: for those actions (and omissions) the defense of qualified immunity offers no protection. *See Harlow*, 457 U.S. at 818. The District Court erred in excusing Blue's conduct under his claim of qualified immunity. (The Court of Appeals' failure to address this issue was also error.)

**Question Presented for Review #2**

> Was Blue's denial of Justin's clearly defined 8th and 14th Amendment rights and his failure to protect Justin's best interest objectively unreasonable in light of the surrounding circumstances?

Certain of Blue's actions were arguably discretionary. To the extent they were found to be so, the defense of qualified immunity is only available if Blue's conduct, in light of those rights, was objectively reasonable and, therefore, did not constitute

subjective deliberate indifference. Section 1983 creates a private right of action against those individuals violating our rights while acting under the color of law. Section 1983, extends a duty of care to both prisoners and pretrial detainees. *Hare v. City of Corinth*, 74 F.3d 633, 650 (5th Cir. 1996). It includes a prisoner's right to have his basic human needs reasonably met during his period of forced confinement, including the right to receive medical care and to be protected from self-inflicted harm. *Id.* In cases such as Justin's, the courts recognize that "a serious medical need may exist for psychological or psychiatric treatment, just as it may exist for physical ills." *Partridge v. Two Unknown Police Officers*, 791 F.2d 1182, 1187 (5th Cir. 1986). To deny such basic needs violates the Eighth Amendment's prohibition against cruel and unusual punishment as extended under the due process clause of the Fourteenth Amendment. *See Jacobs v. West Feliciana Sheriff's Dept.*, 228 F.3d 388, 394 (5th Cir. 2000).

The doctrine of qualified immunity is designed to "'give ample room for mistaken judgments (for discretionary acts or for violations of vague or obscure laws) by protecting 'all but the

plainly incompetent or those who knowingly violate the law." *Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir. 1995); *Hare v. City of Corinth*, 135 F.3d 320, 325 (5th Cir. 1998) *citing Malley v. Briggs*, 475 U.S.335, 341, 106 S.Ct. 1092 (1986). Therefore, the defense of "qualified immunity" would not shield these Defendants from liability only if Blue's actions were done in subjective deliberate indifference to Justin Smith's clearly established legal right.

The government's failure to provide pre-trial detainees with adequate protection from their known suicidal impulses is clearly defined and, therefore, actionable under §§ 1983. *Burns v. City of Galveston, Texas*, 905 F.2d 100, 104 (5th Cir. 1990); *Partridge*, 791 F.2d at 1188. In order to determine whether evidence was presented raising an issue of Byron Blue's subjective deliberate indifference to Justin Smith's 8th Amendment Rights, the Court was required to apply traditional summary judgment standards. "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence." *Farmer v. Brennan*, 511 U.S. 825, 842, 114 S.Ct. 1970 (1994); *see also Smith v. Brenoettsy*,

158 F.3d 908, 913 (5th Cir. 1998) The question of whether a prison official had the requisite knowledge that a substantial risk existed is a question of fact for the jury. A jury may conclude that a prison official knew of a substantial risk simply from the very fact that the risk to the inmate or detainee was obvious." *Farmer*, 511 U.S. at 842.

Here the risk of fatal, self inflicted harm by (Justin) was open and obvious. On August 27, 1997, only six days prior to Smith's suicide, Blue noticed Justin repeatedly standing on a table with a sheet, then a blanket, held up around his neck. R. 1667. Once Blue found Justin standing on a table with a sheet in his hands, he not only had *actual knowledge* that Justin was threatening suicide, but Blue also knew that, unless the sheets in his cell were removed, Justin also had a plan, the manner and means to make his death happen. This alone is sufficient evidence for a jury to conclude that Blue's later action in leaving Justin in isolation without confirming that his sheets were removed or that regular checks were made and documented was not objectively reasonable. (After the earlier incident, Blue checked the pre-printed line which stated that he believed "(Justin) is or potentially is going to inflict harm on

himself" which supported Blue's decision to place Justin in restraints and a helmet SIX DAYS BEFORE HIS DEATH. It also discredits Blue's masturbation explanation.) R. 1669. On August 27, all items of property were eventually removed from Justin's cell and Justin was placed under "constant watch". Still no medical treatment was ordered and his case worker was not alerted to his suicidal condition. R. 1667, 1242.

Justin's records reflected his diagnoses of sever chronic depression, bipolar disorder and ADHD. Blue knew Justin had been denied visits and contact with his family. Blue knew his confinement was extended shortly before Justin's scheduled release. He knew that Justin was evaluated in early August and put on "constant watch." Blue knew that, on the day of Justin's death, Justin was being punished for refusing to come out from underneath his bed. A genuine issue of material fact existed as to whether an objective officer, in light of these facts, would deny Justin routine checks, leave sheets in his room and not get him medical help, in light of Justin's 8th Amendment rights.

> Did further inquiry into whether an official's conduct was "objectively reasonable"become moot once the official

denied that he acted with subjective deliberate indifference to the claimant's well defined legal rights?

The lower courts found Blue's own affidavit to be dispositive on the question of subjective deliberate indifference. Petitioners complain that not only did this violate traditional summary judgment standards, but that here, where the affiant is a defendant, employee convicted of fabricating evidence in this case, his affidavit was incompetent for summary judgment purposes. While at trial it may create a fact issue, subjecting him to harsh impeachment; for summary judgment purposes it is so tainted as to constitute no evidence of any weight sufficient to deny Petitioners' their day in court. The Court of Appeals and the District Court opinions, while giving a cursory acknowledgment to Petitioner's objective reasonableness contentions, essentially ruled based on an outcome determinable fashion, relying exclusively on Blue's own self-serving statement. Blue said he did not possess subjective, deliberate indifference to Justin's rights and, therefore, such indifference must not exist.

Since Blue's mind set is not an objective fact which would be "readily controvertible" and "because qualified immunity turns

only upon the objective unreasonableness of the defendant's acts, a particular defendant's subjective state of mind has no bearing on whether the defendant is entitled to qualified immunity." *Thompson v. Upshur County, Texas*, 245 F.3d 447, 457 (5th Cir. 2001). In short, what Blue says he thought is neither controlling or, for that matter, even particularly relevant, especially in this case.

Since the court is required to draw all possible inferences that can be drawn from the underlying facts in deference to the non-movant's position and to construe any conflicts in non-movant favor, to allow this type of evidence is without purpose or effect. Blue's affidavit and testimony should instead be stricken, for purposes of summary judgment, rather than have Petitioner's struggle as to what weight, if any, the Courts will place on an affidavit, if such a reprobate. *See Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir. 1999); *Thompson v. Upshur County*, 245 F.3d 447, 457 (5th Cir. 2001) *citing Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034 (1987).

Blue must be required to show that his conduct was objectively reasonable before he is entitled to be excused under the

doctrine of official immunity. To do so, Blue should have provided the Court with evidence sufficient to allow it to "put itself in the shoes of a reasonable officer as he or she approaches a given situation and how he or she would assess the likelihood of danger in a particular context." *United States v. Rideau*, 969 F.2d 1572, 1574 (5th Cir. 1992) (emphasis added). If, under scrutiny, the evidence raises a fact issue such that a reasonable official would understand that what the charged official is doing violates the Plaintiff's rights, summary judgment is improper.

Justin was a deeply depressed, suicidal young man who terribly missed his family. He was sent to Delta 3 because he had stolen a bicycle and violated curfew. R. 1604. The ultimate goal of the District Court was placing him in an environment that would foster and promote Justin's best interests. *Id.* The breaches of these rights by Byron Blue are serious constitutional violations. They are even more wanton because of Justin's status as a minor with diagnosis of severe psychological and emotional illnesses. Byron Blue acted unreasonably in light of the circumstances and the law as established at the time of Justin Smith's untimely death. Blue

possessed actual, subjective awareness of Justin Smith being on the brink of suicide, yet chose to do nothing to protect Justin's constitutional rights. R. 829. At the time of Justin Smith's death, it is uncomprehensible to believe that any objective officer behaving reasonably would have disregarded so many actual prior suicide attempts as well as violated established policy designed to protect against such tragedies. Accordingly, the granting, and affirmation of the District Court's summary judgment was improper.

**Question Presented for Review #3**

> Whether the Court of Appeals for the Fifth Circuit erred in affirming the District Court's grant of summary judgment based upon Byron Blue's testimony because his felony conviction for falsifying the observation sign-in sheets in connection with Justin Smith's death under the Texas Penal Code §37.09 makes his testimony unreliable, thus creating a genuine issue of material fact which is properly determined by a jury.

Byron Blue was convicted of the felony charge of "Tampering with or Fabricating Physical Evidence" under Section 37.09 of the Texas Penal Code. *See* Tex. Pen. Code Ann § 37.09 (Vernon 2000). This charge and conviction was a direct result of his intentionally destroying the original sign in sheet next to Justin's

cell in an effort to protect himself from possible repercussions surrounding Justin's death. R. 464.

Rule 609 of the Federal Rules of Evidence provides that the credibility of a witness can be attacked if the witness has been convicted of a crime which was punishable by imprisonment of one year. *See* Fed. R. Evid. 609. Blue was sentenced to five years in prison. R. 464. Additionally, the credibility of a witness may be attacked by showing that the witness has been convicted of a crime involving dishonesty or false statement, regardless of punishment. *Id.* A conviction under Texas Penal Code Section 37.09 would have subjected Byron Blue to impeachment under both sections of Federal Rule of Evidence 609. Despite these convictions and the aggravating factor that the conviction was for conduct destroying and fabricating evidence relating to Justin Smith's death, the District Court gave Blue's testimony full and complete credibility, even on an issue not subject to independent verification e.g., subjective intent. In this instance, Blue's testimony merely creates a fact issue for a jury. By accepting Blue's testimony as true, the District Court held direct contrary to relevant summary judgment case law. *See Anderson v.*

*Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505 (1986) (holding that credibility determinations are jury functions, not those of a judge.) As an interested witness, Byron Blue's testimony alone, whether or not controverted by circumstantial evidence, could not be taken as sufficient to conclusively establish the issue of whether Blue possessed subjective awareness of Justin's suicidal condition. R. 1721-26

At the very least, a genuine issue of material fact existed as to whether Byron Blue exhibited subjective deliberate indifference to violations of Justin's constitutional rights.

**Question Presented for Review #4**

> Whether Harris County's policy of warehousing children with known diagnosed mental illness in penal institutions which lacked the capacity to provide adequate medical treatment violated Justin Smith's rights under the 8th and 14th Amendment of the United States Constitution and Texas Statute.

During Justin's time of confinement at Delta 3, Harris County and the facility had access to Justin's medical history including his diagnosis, medication and even a written history of his first suicide attempt. R. 744. They also had later incident reports, completed by Delta 3's own staff, which indicated that Justin had

physically mutilated himself on several occasions and only days before his death was found repeatedly trying to tie a sheet around his neck, apparently in an effort to commit suicide. R. 1247. Harris County's Medical Assessment of Justin completed prior to his being taken into custody, shows that Harris County had actual knowledge of Justin's multiple diagnoses, treatment with Prozac and Ritilin and his past behavioral problems, learning deficits and his earlier suicide attempt. R. 1612. The assessment actually noted that Justin had suicide ideations and prior suicide "problems." *Id.* The psychological screening conducted by Harris County noted that Justin posed a danger towards himself. R. 1607. The report recommended individual counseling to treat Justin's depression. R. 1606. At the time of his confinement, Justin Smith was a child under the meaning of Title III of the Texas Family Code. R. 1604; *See* Tex. Fam. Code Ann. Title III (Vernon 2000). The Order that placed Justin at Delta 3 indicated that it was in the best interest of Justin and his health, safety, morals and education to be taken from his home and entrusted to the care of Harris County. *Id.* The moment that Justin's life and liberty were taken from him and placed outside the

control of his family, Harris County became entrusted with responsibility to protect his individual liberties best interests. R. 1604. "The infant is always a ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care so that no injustice be done him." *du Pont III v. Southern National Bank of Houston*, 771 F.2d 874, 882, (5th Cir. 1985), *cert. denied* 475 U.S. 1085, 106 S.Ct. 1467 (1986). In order to adequately protect Justin's interests, Harris County could not merely warehouse Justin but rather, had to faithfully discharge the court's order so as to provide medical care and protect his best interests while he was within its care. R 1604.

**Question Presented for Review #5**

> Did Harris County create a hierarchy designed to insulate its policy makers from gaining actual knowledge of obvious constitutional violations.

The Harris County Juvenile Board ("HCJB") has had the dubious distinction of being in the vanguard of all the unethical, uncaring, and sometime even illegal actions which have been perpetrated by some of the largest American Corporations and governmental entities. Enron and WorldCom are prime examples of

the extent of deceitfulness to which CEO's and members of the Board of Directors engage in shell games, imposing multiple layers themselves from the actual actors who perform the primary misdeeds on the corporation's behalf. By doing so, those at the top can remain unresponsive and unaccountable and avoid being charged with knowing what unethical and illegal acts their employees were performing to accomplish the corporation's goals: to better its projections and increase its bottom line. The HCJB has attempted to insulate itself, just like the leaders of these now infamous corporations, from knowing what was actually happening in their respective organization so they too may avoid legal liability.

The HCJB has insulated itself from exposure to liability under 42 U.S.C. 1983 by creating layer after layer of bureaucracy, ultimately leaving the HCJB intentionally ignorant of every individual case prior to the time as that child becomes a "statistic." They have deliberately created layers and set policies which prevent the upward flow of critical information so as to eliminate its knowledge of problems in the day to day operations of the various HCJD facilities including the "boot camps". R. 1359. This insidious

system of not having established policies and procedures for the upward transfer of pertinent information led to the tragic death of Justin Smith. This purposefully developed scheme, done to insulate and shield the HCJB from responsibility for violating a child's constitutional rights is itself unconstitutional.

Apart from the over crowding, under-staffing and budget cuts Harris County and it's Board appear unaware of what actual policies were in place at Delta 3. R. 1353-54. This blatantly self-serving layer of insulation appears designed to protect Harris County from Section 1983 liability. These intentional, built-in blind folds (from actual knowledge) were, in essence, a "don't ask, don't tell policy." The Juvenile Board and those individuals required to report directly to them knew few listened anyway, so better just,"don't ask." Those working at Delta 3 knew few listened anyway so, better just, "don't tell." This allowed the Juvenile Board to conveniently maintain that they truly "did not know" of the "official" "unofficial" policy" that was being carried out at Delta 3. The victims of this insulation scheme are Justin and his family. Those who suffered because Harris County utterly failed to carry out its duty of protecting every child's

best interests.

## X. Conclusion

Petitioners provided the trial and appellate courts with sufficient evidence to meet their burden to defeat Byron Blue and Harris County's Motions for Summary Judgment. The court not only erroneous excluded Petitioners evidence (such as the Snow report/investigation which the court ruled to be "hearsay" which was clearly an admission by a party opponent), but took as definitive the affidavit of a convicted, interested witness who fabricated and destroyed evidence in this case. The court ignored the requisite standards and presumptions required in the consideration of summary judgment motions and allowed that which was objectively intolerable to be excused as subjectively plausible.

Our judicial system should not tolerate blatant perjury. Byron Blue and the HCPD set the example for Justin Smith and hundreds of children like him. It hid and cut corners while holding Justin for months for stealing a bicycle and breaking curfew.

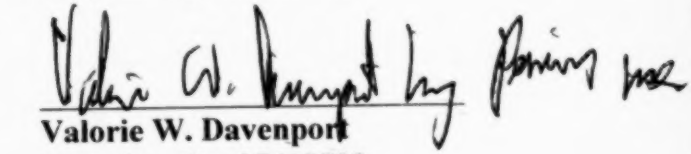
While the tragedy which occurred on September 2, 1997 cannot be changed, this Court should: objectively determine what is

reasonable, what is right and what is just; ensure that those who set the standard cannot absolutely shield themselves to avoid accountability; condemn perjurers and reaffirm the value of a child's life; enforce the need for adequate medical care to treat all forms of clinical depression and other brain based disorders; and reaffirm the right of juries to review and determine, in those situations where it is recognized and proper, fact issues surrounding the propriety of the workings of our government and the conduct of those operating under color of law.

Harris County's actions and policy in failing to provide adequate medical treatment and its failure to zealously protect Justin Smith (and every child's best interests), has left one child dead. It, like Byron Blue, should face a Harris County jury and be made to answer for its actions.

WHEREFORE PREMISES CONSIDERED, Appellants respectfully pray that this Court set aside the District Court's granting of Summary Judgment in favor of Byron Blue and Harris County and remand this case to the District Court for a trial on the merits. Appellants also pray for such other relief, at law or in equity, general or specific, to which they may be justly entitled.

Respectfully submitted,



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